

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ENTERPRISES INTERNATIONAL,  
INC.,

Plaintiff,

v.

PASABAN, S.A.; SERGIO PASABAN  
and JANE DOE PASABAN I; ALFREDO  
PASABAN and JANE DOE PASABAN  
II; CRISTINA PASABAN and JOHN  
DOE PASABAN,

Defendants.

CASE NO. 3:11-cv-05919-RBL

ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS

[Dkt. # 18-27, 30, 31]

THIS MATTER is before the Court on Defendants' Motion to Dismiss for lack of personal jurisdiction, forum non conveniens, and failing to comply with the filing requirements for a derivative action [Dkt. #18]. The case arises out of a breach of contract and shareholders derivative action on behalf of L.P., Inc. (which is actually incorporated as "L.P."), initiated by Plaintiff Enterprises against Defendants for infringing on L.P.'s exclusive right to sell and market equipment in certain countries. For the reasons that follow, the motion is DENIED and Plaintiff's request for leave to amend is GRANTED.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4

While the Lamb family was building its pulp and paper company, Pedro Pasaban,<sup>2</sup> a Spanish citizen, was busy starting Talleres Pasaban in Tolosa, Spain (founded 1928). Talleres Pasaban is the predecessor to Pasaban, S.A., the Defendant here.<sup>3</sup> Pasaban began as a paper mill machinery repair shop, eventually evolving into a manufacturer of paper and board machinery including cutters, reelers, printers, and bag manufacturing machines. Pasaban is best known for its manufacturing of sheeters, winders, and other products used to manufacture and prepare paper. A sheeter takes one or more rolls of paper and cuts it into sheets of paper. A winder unrolls rolls of paper and cuts the roll into smaller ones.

<sup>3</sup> For clarity, the Court will refer to Talleres Pasaban, Pasaban, S.A., and its other predecessors as “Pasaban.”

1 In the 1980s, Pasaban began selling its sheeters and winders outside of Spain. The  
2 sheeters and winders were compatible with and complementary to other paper processing  
3 equipment manufactured by Enterprises. At that time, Isaac Pasaban led the Pasaban company.  
4 Isaac is the father of the individual defendants in this case, Sergio, Cristina, and Alfredo. Luis  
5 Ara was the “director of coordination” for the Pasaban family. Decl. of David E. Lamb at 2  
6 [Dkt. #31]. Julian Echeverria was the sales director of Pasaban.

7 Pasaban and Enterprises began what would be a thirty-year relationship. David Lamb  
8 traveled to Europe to inspect the Pasaban equipment, intending to make Enterprises the  
9 marketing and sales agent for Pasaban in the United States. Following David Lamb’s visit, Isaac  
10 Pasaban sent a letter to Enterprises expressing interest in visiting Hoquiam and Tacoma, as well  
11 as a desire to enter into “lines of collaboration for the progress of our discussed projects.” *Id.* at  
12 Ex. 2 (letter of April 23, 1986). In 1987, Enterprises and Pasaban executed an Agency  
13 Agreement, which operated for three or four years (it appears unclear). Under the agreement,  
14 Enterprises acted as Pasaban’s exclusive agent in North America and the Pacific Rim under the  
15 name “Lamb Pasaban.” Pasaban and the individual defendants, through Enterprises, sold multi-  
16 million dollar projects in Michigan, Virginia, and Quebec, totaling approximately \$13,000,000 in  
17 sales.

18 During those years, Pasaban and Enterprises began discussing converting the agency  
19 relationship into a joint venture with a jointly owned corporation serving as the vehicle. Ara and  
20 Echeverria, Pasaban’s agents, visited Tacoma and Hoquiam approximately four or five times,  
21 Sergio and Isaac Pasaban visited Washington, and David Lamb traveled to Europe. Most of the  
22 negotiations were between Lamb, Ara, and Echeverria because of language barriers. Lamb did  
23  
24

1 not doubt that Ara and Echeverria were negotiating on behalf of Pasaban's board, which was  
2 comprised of Isaac, Sergio, Cristina, and Alfredo.

3 In 1989, Enterprises and Pasaban decided to join together and market sheeters and  
4 winders internationally, creating a wholly-owned American subsidiary, Pasaban Americana, Inc.  
5 Importantly, Pasaban Americana is a Washington corporation. The individual defendants have  
6 served as both directors and officers of Pasaban Americana since its inception and continued to  
7 hold those positions until Enterprises filed the Complaint. Pasaban owns Pasaban Americana  
8 outright.

9 On January 29, 1990, Pasaban and Pasaban Americana entered into a License Agreement  
10 ("Pasaban License"), under which Pasaban granted certain rights to Pasaban Americana,  
11 including rights to manufacture, market, and service products such as winders and sheeters in  
12 certain countries. The agreement adopts Washington law and provides that Pasaban consents to  
13 jurisdiction and venue in the state or federal courts of Pierce County.

14 On March 31, 1990, Pasaban entered into an Estoppel Agreement with Enterprises, which  
15 secured the rights transferred in the Pasaban License for the benefit of Enterprises. In that one-  
16 page agreement, Pasaban agreed not to modify the Pasaban License without Enterprises' consent.  
17 The Estoppel Agreement does not contain a jurisdiction or venue provision.

18 On July 6, 1990, Enterprises and Pasaban Americana formed L.P., Inc., a Washington  
19 corporation, allotting 51% ownership to Enterprises and 49% to Pasaban Americana. The two  
20 companies, Pasaban Americana and Enterprises, simultaneously entered into a Shareholders  
21 Agreement and a License Agreement ("L.P. License") with L.P. Under the L.P. License,  
22 Pasaban Americana granted to L.P. all the rights and privileges Pasaban Americana had obtained  
23 from its parent—Pasaban, S.A. The L.P. License and the Shareholders Agreement provide that  
24

1 “[a]ny dispute arising between any of the parties hereto and concerning this Agreement shall be  
2 arbitrated at Tacoma, Washington, or such other city as is mutually agreed upon by the parties, in  
3 accordance with the UNCITRAL Rules of Arbitration.” Decl. of Gustavo Lascurain, Ex. C at 9  
4 [Dkt. #22]. The agreements also state that Washington law governs, and the parties consent to  
5 jurisdiction and venue in the state or federal courts in Pierce County.

6 L.P.’s original board of directors consisted of Ara, Sergio, Echeverria, David Lamb,  
7 Frank Lamb, and William Mehaffey. Tacoma attorney, Carol MacKinnon, incorporated L.P. and  
8 served as its registered agent and counsel. Isaac and Sergio executed the Shareholders  
9 Agreement on behalf of Pasaban Americana.

10 L.P.’s principal place of business is in Mobile, Alabama, where its general manager, Tom  
11 Ebel, resides. David Lamb is L.P.’s current vice president and director.

12 On November 9, 2011, Enterprises brought suit against Pasaban and the three individual  
13 defendants and their spouses in this Court. Enterprises sued on its own behalf and derivatively  
14 on behalf of L.P. Enterprises alleges that, since the license agreements were executed, Pasaban  
15 has been extensively marketing the subject equipment<sup>4</sup> within L.P.’s exclusive territory—  
16 violating L.P.’s exclusive distribution rights. Thus, Pasaban has allegedly restricted L.P.’s  
17 business primarily to servicing existing equipment and providing spare parts in North America.  
18 Upon discovery of Pasaban’s activities in January 2011, Enterprises notified Pasaban’s manager,  
19 who expressed ignorance of the existence of the agreements between Pasaban, Pasaban

---

21 <sup>4</sup> The agreements provide that “subject equipment” means “(i) sheeting and winding equipment  
22 and associated spare parts manufactured by [Pasaban], but excluding pulp cutters and (ii) such  
23 other equipment and associated spare parts as [Pasaban] may wish to sell in the Territory.” Decl.  
24 of Gustavo Lascurain, Ex. A at 1. The agreements define the “Territory” as “North America,  
Brazil, Asia (except USSR, India, Pakistan, Ceylon, Sri Lanka, and the Middle East), New  
Zealand and Australia.” *Id.*

1 Americana, L.P., and Enterprises. On July 25, 2011, Sergio sent a letter to Enterprises  
2 attempting to terminate or otherwise modify the Pasaban License, allegedly in direct  
3 contravention of the Estoppel Agreement. Pasaban and Pasaban Americana denied that they had  
4 breached the Estoppel Agreement.

5 Enterprises has not attempted any demand on L.P.'s board and asserts that demand would  
6 be futile, as the board is equally split between Enterprises- and Pasaban-controlled directors.

7 In sum, Enterprises alleges breach of the L.P. License, breach of the Estoppel Agreement,  
8 and unfair competition. Enterprises requests an accounting, specific performance, injunctive and  
9 declaratory relief, actual damages, treble damages, reasonable attorney's fees, experts' fees, costs  
10 and expenses. On April 2, 2012, Defendants answered, asserting lack of personal jurisdiction  
11 and forum non conveniens. Three days later, Defendants moved to dismiss for lack of personal  
12 jurisdiction, forum non conveniens, and improper filing under Federal Rule of Civil Procedure  
13 23.1.

## 14 **II. DISCUSSION**

15 As an initial matter, Enterprises' request for an extension of time is moot. The requested  
16 deadline of May 25, 2012, has passed and Enterprises has already filed its completed response to  
17 Defendants' Motion to Dismiss. Therefore, the Court will address only the substantive  
18 arguments on the Motion to Dismiss.

### 19 **A. Forfeiture of Challenge to Personal Jurisdiction**

20 Enterprises argues that the motion to dismiss should be denied because Defendants filed  
21 it after their answer, rendering it untimely. Defendants argue that judicial economy favors  
22 consolidating motions, as they have done here, and considering Defendants' Motion to Dismiss  
23 for lack of personal jurisdiction would not prejudice Enterprises.  
24

1 A defendant abandons a personal jurisdiction defense when he or she fails to raise the  
2 issue in either a responsive pleading or a Rule 12 motion. *See Stubbs v. Wyndham Nassau*  
3 *Resort & Crystal Palace Casino*, 447 F.3d 1357, 1364 (11th Cir. 2006). Personal jurisdiction  
4 may also be forfeited—even if a defendant has nominally preserved the defense by reciting it in  
5 an answer—if that defendant substantially participates in the litigation without actively pursuing  
6 its Rule 12(b)(2) defense. *See Rates Tech., Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1309  
7 (Fed. Cir. 2005). To determine whether a party has forfeited personal jurisdiction by conduct,  
8 courts look to the length of time that elapses between service of process and a defendant’s  
9 pursuit of a personal jurisdiction defense with a Rule 12(b)(2) motion. The longer the time  
10 interval, the more likely it is that courts will find a waiver. *See Hamilton v. Atlas Turner, Inc.*,  
11 197 F.3d 58, 62 (2nd Cir. 1999) (holding defendant forfeited personal jurisdiction defense by  
12 failing to raise it for four years after inclusion of defense in answer). Courts also look to the  
13 extent of the objecting defendant’s involvement in the action. *See id.* (waiver where defendant  
14 had participated in extensive pretrial proceedings before filing motion to dismiss); *Yeldell v. Tutt*,  
15 913 F.2d 533, 539 (8th Cir. 1990) (waiver where defendant participated in discovery, filed  
16 motions, participated in five-day trial, and filed post-trial motions, all before seeking ruling on  
17 personal jurisdiction defense).

18 Defendants filed their Motion to Dismiss three days after filing their Answer, which  
19 asserted lack of personal jurisdiction. Three days is insignificant, especially when compared to  
20 those cases where defendants waited months or years to file a motion to dismiss. Further,  
21 Defendants have not substantially participated in the litigation. The only other pleading filed by  
22 Defendants was a response to Enterprises’ Motion for Order Confirming Service Nunc Pro Tunc.  
23 Defs.’ Resp. to Mot. for Order Confirming Serv. [Dkt. #13]. Accordingly, the Defendants’  
24

1 Motion to Dismiss for lack of personal jurisdiction was properly filed after the Answer and this  
2 Court will address it on the merits.

3 **B. Personal Jurisdiction**

4 Defendants argue that this Court does not have personal jurisdiction over them because  
5 Pasaban is a Spanish corporation, and the individual defendants are Spanish citizens who have  
6 visited Washington once or twice each, about twenty years ago. They also argue that Pasaban  
7 does not have any offices, shops, plants, or other formal presence in the United States. They  
8 contend that merely entering into a contract with a Washington entity is not enough to establish  
9 jurisdiction.

10 Enterprises argues that the Court may exercise personal jurisdiction because of the 25-  
11 year history of Defendants' contacts with this jurisdiction, which include (but are not limited to)  
12 the individuals' visits to Washington in the 1980s and 1990s to negotiate and execute contracts,  
13 attendance at board meetings, Pasaban's three-year agency relationship formed in this  
14 jurisdiction with a Washington corporation, Pasaban's creation of a wholly-owned subsidiary  
15 incorporated in Washington, the individuals' roles on the boards of directors and as officers of  
16 two Washington corporations for twenty years, and Defendants' receipt of significant  
17 compensation from Washington corporations.

18 In the context of a challenge to the Court's jurisdiction, a plaintiff's factual allegations  
19 are construed in the light most favorable to him. Plaintiff is required only to make a prima facie  
20 showing of personal jurisdiction. *See Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1082,  
21 1087 (Fed. Cir. 2003).

22 Washington's long-arm statute (RCW 4.28.185) represents legislative intent to assert  
23 personal jurisdiction over a foreign entity to the full extent permitted by due process. *Byron*  
24



1 *Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462, 465 (1999). “[D]ue process requires  
2 only that in order to subject a defendant to a judgment in personam, if he be not present within  
3 the territory of the forum, he have certain minimum contacts with it such that the maintenance of  
4 the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co.*  
5 *v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In  
6 Washington, courts use three criteria to determine specific jurisdiction: (1) the nonresident  
7 defendant or foreign corporation must purposefully do some act or consummate some transaction  
8 in the forum state; (2) the cause of action must arise from, or be connected with, such act or  
9 transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional  
10 notions of fair play and substantial justice, consideration being given to the quality, nature, and  
11 extent of the activity in the forum state, the relative convenience of the parties, the benefits and  
12 protection of the laws of the forum state afforded the respective parties, and the basic equities of  
13 the situation. *Perry v. Hamilton*, 51 Wn. App. 936, 939 (1988); *see also Freestone Capital*  
14 *Partners, L.P. v. MKA Real Estate Opportunity Fund*, 155 Wash. App. 643, 652–53 (2010)  
15 (quoting *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 767 (1989)).

16 Pasaban Americana , as a Washington corporation, is clearly subject to Washington law.  
17 The only question is whether Pasaban S.A., a Spanish entity, and the individual Defendants, are  
18 subject to Washington jurisdiction as the sole owners of Pasaban Americana. Where the  
19 corporate vehicle is employed as a device by which to conduct “continuous and systematic”  
20 activities in a state without subjecting the out-of-state corporation to the general jurisdiction of  
21 the forum, it may be just and equitable to treat two separately incorporated entities as one. *Wells*  
22 *Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 425 (9th Cir. 1977). Factors to consider in  
23 determining alter ego in the jurisdictional context are:  
24

1 [W]hether the officers and directors of the two are the same; whether the subsidiary pays  
2 cash for products sold or service rendered to it by the parent; whether separate books,  
3 bank accounts, tax returns, financial statements and the like are kept; and whether the  
4 parent corporation holds the subsidiary out as an agent, either expressly or impliedly as  
5 by representing it is doing business in, or has an office in the state, when only the  
6 subsidiary is present.

7 *Id.* at 426.

8 Enterprises' exhibits indicate that Pasaban Americana was an empty shell through  
9 which Pasaban could freely conduct its business in the United States without threat of suit.  
10 Many of the exhibits refer to Pasaban the parent and not the subsidiary. L.P.'s income tax  
11 returns even identify Pasaban, S.A., as the "ultimate indirect 25% foreign shareholder," rather  
12 than Pasaban Americana (as the Shareholders Agreement and L.P. License state). Decl. of David  
13 E. Lamb, Exs. 29–30. Further, the officers and directors of Pasaban Americana and Pasaban,  
14 S.A., are the same: Sergio, Alfredo, and Cristina. Pasaban also held Pasaban Americana out as  
15 its agent, specifically in the Pasaban License, L.P. License, and Shareholders Agreement.  
16 Perhaps most obviously, the very name—Pasaban Americana—indicates that the company is  
17 merely Pasaban, S.A.'s arm in the United States. Accordingly, the evidence, when viewed in the  
18 light most favorable to Enterprises, demonstrates that Pasaban Americana is merely an alter ego  
19 of Pasaban, S.A. Thus, Enterprises makes a prima facie showing that this Court has personal  
20 jurisdiction over Pasaban, S.A.

21 As to the individual defendants, courts assess each defendant's contacts with the forum  
22 state individually. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Rush v. Savchuk*, 444 U.S. 320,  
23 332 (1980). Defendants' conduct and connections with the forum state must be such that the  
24 defendants "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in

1 that forum. *Kransco Mfg., Inc. v. Markwitz*, 656 F.2d 1376, 1379 (9th Cir. 1981); *Forsythe v.*  
2 *Overmyer*, 576 F.2d 779, 782 (9th Cir. 1978). However, the individual defendants' status as  
3 corporate officers "does not somehow isolate them from jurisdiction." *Calder*, 465 U.S. at 790.  
4 Courts can exercise personal jurisdiction over a corporate officer where a plaintiff demonstrates  
5 that a corporate officer is personally liable for wrongdoing in the forum or if the corporation is  
6 the alter ego of the individual officer. *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520–21 (9th  
7 Cir. 1989). A corporate officer's contact on behalf of a corporation is sufficient to subject the  
8 officer to personal jurisdiction where the officer "is a primary participant in the alleged  
9 wrongdoing or had control of, and direct participation in the alleged activities." *Allstar Mktg.*  
10 *Group, LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1120 (C.D. Cal. 2009) (internal  
11 quotations omitted). Here, the Court must conclude that Enterprises makes a prima facie  
12 showing supporting the exercise of jurisdiction over the individual Defendants.

13 First, and most importantly, Sergio, Alfredo, and Cristina actively participated in the day-  
14 to-day operations of L.P.—a Washington entity. Enterprises' exhibits show that any transaction  
15 entered into on behalf of L.P. or Pasaban was subject to approval by Sergio, Alfredo, and  
16 Cristina. Alfredo also supervised Pasaban and L.P.'s projects throughout the world in person.  
17 Sergio, Alfredo, and Cristina were not passive officers or directors in the operations of L.P. and  
18 Pasaban. They attended all board meetings for L.P. and Cristina was a signatory on L.P.'s  
19 United States bank account. Enterprises has made a prima facie showing that Sergio, Alfredo,  
20 and Cristina, in their roles as officers and directors of Pasaban, had control of or direct  
21 participation in the alleged sales and marketing of the subject equipment in L.P.'s exclusive  
22 territory.

1 Second, Enterprises alleges Sergio, Alfredo, and Cristina acted as officers and directors  
2 of L.P. and Pasaban when they violated the contracts that they negotiated on behalf of L.P.,  
3 Pasaban Americana, and Pasaban. Enterprises alleges that Sergio attempted to terminate or  
4 otherwise modify the Pasaban License in direct contravention to the Estoppel Agreement. This  
5 alleged breach is central to this action. Sergio also signed the L.P. contracts on Pasaban's behalf.

6 In response, Sergio, Alfredo, and Cristina argue that the exercise of jurisdiction would be  
7 unreasonable. However, they have argued only that they are Spanish citizens and have not been  
8 to Washington more than three or four times. They also argue that the Court should look to L.P.  
9 and Pasaban Americana's principal places of business, which are not in Washington. It should  
10 come as no surprise to the individual defendants that they are being haled into this Court because  
11 of their thirty-year relationship with Enterprises and David Lamb, their positions as officers and  
12 directors of two Washington corporations, and their various business transactions involving  
13 Washington. Two of the major contracts signed on behalf of Pasaban and its subsidiary provide  
14 for jurisdiction in this forum. They even created Pasaban Americana as a Washington  
15 corporation with the expectation that that company would be Pasaban's buffer for lawsuits in this  
16 country. After spending twenty years operating Washington corporations and doing business out  
17 of Washington, it is reasonable to hale them into court here for breaching obligations to those  
18 Washington corporations. Accordingly, the individual Defendants have not sufficiently shown  
19 that this Court's exercise of personal jurisdiction would be unreasonable.

### 20 **C. Forum Non Conveniens**

21 Defendants argue that this Court is an inconvenient forum, and this suit should be  
22 brought in Spain or China. The argument for Spain is obvious (Pasaban's place of incorporation  
23  
24

1 and the residence of the individual Defendants); the sole basis for asserting jurisdiction in China  
2 is that the country was part of L.P.'s exclusive territory.

3       Enterprises argues that Spain is an improper forum because this case involves claims by a  
4 Washington corporation, derivative claims on behalf of another Washington corporation, claims  
5 under Washington statutes, and conduct that was directed outside of Spain and caused harm in  
6 Washington. China is also not a proper forum and would be more inconvenient than Washington  
7 because none of the parties reside there or maintain sources of proof there, this case does not  
8 involve a controversy localized in China, and it does not arise under Chinese law.

9       Forum non conveniens enables a court to decline to exercise jurisdiction if "the litigation  
10 can be more appropriately conducted in a foreign tribunal." *Gulf Oil Corp. v. Gilbert*, 330 U.S.  
11 501, 504 (1947). A party moving to dismiss under forum non conveniens must show the  
12 existence of an alternative forum, the threshold requirement for dismissal, and that the balance of  
13 private and public interests favors dismissal. *Lockman Found. v. Evangelical Alliance Mission*,  
14 930 F.2d 764, 766 (9th Cir. 1991). Courts consider five factors in exercising discretion to  
15 dismiss for forum non conveniens:

- 16       (a) The existence of an alternative forum;  
17       (b) The convenience or potential prejudice to the litigants if transferred to another forum;  
18       (c) The public interest at stake including a limitation on the use of a local forum for  
19       resolution of controversies which lack significant local contacts and may require the  
20       untangling of conflict of law questions and the possible application of foreign law;  
21       (d) Trial practicalities including the access to sources of proof, the availability of  
22       compulsory process, the cost of obtaining willing witnesses, the possibility of either a  
23       court or a jury viewing the scene if it is a case in which a viewing would be appropriate  
24       and the enforceability of a judgment should one be obtained; and  
25       (e) Consideration of any other factors which would bear on the interests of the original  
26       and alternative forums in the subject matter of the suit or on the possibility in either  
27       forum of a fair, expeditious and inexpensive trial.

28 *Gulf Oil Corp.*, 330 U.S. at 508–09.

1 Defendants argue that most of the discovery process will occur in Spain, that Pasaban is  
2 incorporated in Spain, and that the individual defendants are Spanish citizens. However, the  
3 contracts at issue provide that Washington law governs. Defendants incorporated Pasaban  
4 Americana and L.P. in Washington and they contracted with Enterprises, a Washington  
5 corporation. Most sources of proof are in Washington, the individuals are subject to personal  
6 jurisdiction here, and most of the harm alleged occurred here. Defendants' arguments do not  
7 sufficiently support the conclusion that Spain is an appropriate alternative forum.

8 Moreover, Defendants have not demonstrated why China would be a superior forum.  
9 Although they argue that China is the location of the alleged breach, the pleadings suggest  
10 otherwise.

11 Defendants are also attempting to create a conflict of laws where no conflict exists: the  
12 L.P. License provides specifically that Washington law governs, and the Estoppel Agreement  
13 refers to the Pasaban License, which also provides for Washington law. Further, Enterprises has  
14 sued Defendants under Washington's unfair competition statute. Enterprises, L.P., and Pasaban  
15 Americana are also Washington corporations, subject to Washington law. This Court will not  
16 need to interpret Spanish or Chinese laws in this case. In sum, Defendants have not met the  
17 threshold requirements for dismissal on forum non conveniens grounds.

#### 18 **D. Federal Rule of Civil Procedure 23.1**

19 Defendants argue that Enterprises did not comply with Rule 23.1 because it failed to  
20 allege in the Complaint that this action is "not a collusive one to confer jurisdiction that the court  
21 would otherwise lack." Defs.' Mot. to Dismiss at 19.

22 Diversity jurisdiction is collusively manufactured when a party who wishes to sue, but  
23 would be unable to bring a diversity action, recruits someone living in another jurisdiction to  
24

1 become a shareholder for the purpose of initiating a derivative suit with diversity jurisdiction.  
2 *Walden v. Elrod*, 72 F.R.D. 5, 13 (W.D. Okla. 1976) (citing *Amar v. Garnier Enters., Inc.*, 41  
3 F.R.D. 211 (C.D. Cal. 1966)).

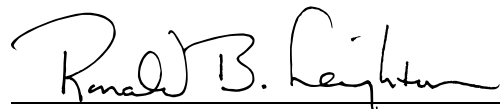
4 Enterprises and its predecessors have been Washington corporations since 1903. L.P. has  
5 been a Washington corporation since its creation, and Enterprises has been the majority  
6 shareholder of L.P. since. Defendants have provided no plausible basis for its allegation that  
7 Enterprises has brought a collusive derivative action and attempted to create diversity  
8 jurisdiction where it did not exist before. However, the Court **GRANTS** Enterprises leave to  
9 amend its Complaint to add that this is not a collusive action to confer jurisdiction pursuant to  
10 Rule 23.1.

### 11 **III. CONCLUSION**

12 Defendants' Motion to Dismiss is **DENIED**. Enterprises' request for leave to amend (to  
13 add statement of non-collusion) is **GRANTED**.

14 IT IS SO ORDERED.

15 Dated this 3<sup>rd</sup> day of July, 2012.

16  
17 

18 Ronald B. Leighton  
19 United States District Judge  
20  
21  
22  
23  
24